

1983

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Recommended Citation

Lorilyn Chamberlin, *National Origin Discrimination Under Section 1981*, 51 Fordham L. Rev. 919 (1983).
Available at: <https://ir.lawnet.fordham.edu/flr/vol51/iss5/6>

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NATIONAL ORIGIN DISCRIMINATION UNDER SECTION 1981

INTRODUCTION

Section 1981¹ guarantees “[a]ll persons within the jurisdiction of the United States . . . the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens.”² The statute prohibits discrimination³ both by private parties⁴ and by state action.⁵ Enacted in the aftermath of the Civil War, section 1981 was primarily intended to eliminate the legal disabilities⁶ imposed on the recently freed slaves by the Southern states’

1. 42 U.S.C. § 1981 (1976). Section 1981 was originally enacted as the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. It was subsequently re-enacted as § 16 of the Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144. The original version of the 1866 Act protected both contractual and property rights from discrimination. However, this version was subsequently recodified into two statutes, the current versions of which are 42 U.S.C. §§ 1981-1982 (1976 & Supp. IV 1980). Today, § 1981 applies to contractual rights, while § 1982 applies to property rights. See *infra* note 125 and accompanying text.

2. 42 U.S.C. § 1981 (1976). Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

3. 1 C. Antieau, *Federal Civil Rights Acts* § 32, at 50 (2d ed. 1980) (“Generally stated, it is only necessary that a plaintiff protected [under § 1981] show that he or she was unlawfully denied one of the rights indicated in the statute by the defendant.”). Some courts state that a plaintiff need not prove intentional discrimination but merely discriminatory impact. *Davis v. County of Los Angeles*, 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); see *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975). However, other courts have held that a plaintiff must show discriminatory intent based on a reading of *Washington v. Davis*, 426 U.S. 229 (1976), requiring proof of intent under the fourteenth amendment. See *Guardians Ass’n of N.Y. City Police Dep’t v. Civil Serv. Comm’n*, 633 F.2d 232, 268 (2d Cir. 1980), *cert. granted*, 454 U.S. 1140 (1982); *Williams v. DeKalb County*, 582 F.2d 2, 2-3 (5th Cir. 1978) (*per curiam*). See generally Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact?*, 80 Colum. L. Rev. 137 (1980) [hereinafter cited as *Discriminatory Purpose or Disproportionate Impact*].

4. *Runyon v. McCrary*, 427 U.S. 160, 168 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (companion statute to § 1981, 42 U.S.C. § 1982 (1976 & Supp. IV 1980), also prohibits acts of discrimination by private parties).

5. The Civil Rights Cases, 109 U.S. 3, 16 (1883); 3 A. Larson & L. Larson, *Employment Discrimination* § 88.10, at 18-5 to 18-6 (1982); see *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419-20 (1948); 1 C. Antieau, *supra* note 3, § 19, at 34; cf. *Hurd v. Hodge*, 334 U.S. 24, 30-31 (1948) (§ 1982 is directed at governmental action).

6. The Slaughter-House Cases, 83 U.S. 36, 70 (1872).

"Black Codes."⁷ Accordingly, the Supreme Court has frequently characterized section 1981 as proscribing discrimination based on race.⁸ The Court has, however, construed section 1981 to apply to race discrimination directed at groups other than blacks; the statute has been interpreted to protect whites⁹ and aliens¹⁰ as well. Still unanswered, however, is the question whether a national origin discrimination¹¹ claims are cognizable under section 1981.¹² This issue is the subject of disagreement among lower federal courts;¹³ they apply four distinct approaches in determining whether a national origin discrimination claim states a cause of action under the statute.¹⁴

7. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427-29 (1968); *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 554 (E.D. Cal. 1982). See generally 3 A. Larson & L. Larson, *supra* note 5, § 88.10; J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 688 (1978). The Black Codes were racially discriminatory state laws which had severely curtailed blacks' civil rights. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427 (1968).

8. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976) (holding that § 1981 applies to "racial discrimination against white persons"); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975) ("§ 1981 affords a federal remedy against discrimination in private employment on the basis of race"); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) (emphasizing "the racial character of the rights being protected").

9. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976).

10. *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948); see *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (per curiam). An alien is a foreign-born U.S. resident who has not been naturalized and is still a subject or citizen of a foreign country. Webster's Third New International Dictionary 53 (1976); see 8 U.S.C. § 1101(a)(3) (1976).

11. While the meaning of national origin discrimination has not been defined by the courts in the context of § 1981, it has been generally defined as discrimination directed at an individual because of the "country where a person was born, or . . . the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). In the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. IV 1980), national origin discrimination has been defined by the Equal Employment Opportunity Commission as discrimination directed at an individual "because of [his or her], or his or her ancestor's place of origin; or because [he or she] has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (1982).

12. *Delaware State College v. Ricks*, 449 U.S. 250, 256 n.6 (1980).

13. See *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (per curiam); *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 559 (E.D. Cal. 1982); *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610, 612 (M.D. Pa. 1978).

14. See *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 560-62, 562 n.20 (E.D. Cal. 1982). Generally, most courts that reject a national origin discrimination claim state that the plaintiff failed to state a claim upon which relief could be granted. See, e.g., *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 786 (W.D. Pa. 1977); *Gomez v. Pima County*, 426 F. Supp. 816, 819 (D. Ariz. 1976). Some courts, however, refer to the plaintiff's lack of "standing" in dismissing national origin discrimination claims under § 1981. See, e.g., *Manzanares v. Safeway Stores*, 593 F.2d 968, 969 (10th Cir. 1979); see also 3 A. Larson & L. Larson, *supra* note 5, § 71.10 (discussing standing under § 1981).

One group of courts concludes that section 1981 applies only to race discrimination claims and does not provide a cause of action based on national origin discrimination.¹⁵ A second approach finds that claims of national origin discrimination are sufficient to survive a motion to dismiss, but requires plaintiffs to demonstrate that the alleged discrimination was based on race rather than national origin.¹⁶ A third, "pragmatic approach," construes section 1981 to protect only those national origin groups that are commonly perceived as "non-white" and have traditionally been the victims of group discrimination.¹⁷ The fourth category of cases rejects the racial standard altogether and holds that a plaintiff may state a valid claim under section 1981 based on either national origin or race.¹⁸

Part I of this Note reviews the judicial interpretations of section 1981 by both the Supreme Court and lower courts. Part II exposes the inconsistencies resulting from the incorporation of a racial test that limits cognizable claims under section 1981 and examines the language and legislative history of section 1981. This Note suggests that the primary concern of Congress more than 100 years ago to protect blacks should not be dispositive for limiting the statute to race discrimination claims today. Finally, this Note concludes that because section 1981 has been construed broadly enough to protect both whites and aliens, it is inconsistent to construe the statute strictly so as to preclude claims by identifiable national origin groups. This conclusion is in keeping with the general policies of the fourteenth amendment, upon which section 1981 rests in part, which considers discrimination based on race and national origin equally egregious.

I. JUDICIAL INTERPRETATION OF SECTION 1981

A. *The Supreme Court*

Historically, section 1981 claims addressed by the Supreme Court have primarily been brought by black plaintiffs.¹⁹ However, in

15. *E.g.*, *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 129 (E.D. Pa. 1978); *Gradillas v. Hughes Aircraft Co.*, 407 F. Supp. 865, 867 (D. Ariz. 1975); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15 (E.D. Pa. 1975).

16. *E.g.*, *Trehan v. IBM Corp.*, 24 Fair Empl. Prac. Cas. (BNA) 443, 445 (S.D.N.Y. 1980); *Patel v. Holley House Motels*, 483 F. Supp. 374, 383 (S.D. Ala. 1979); *Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 186, 187-88 (D. Md. 1977).

17. *E.g.*, *Ridgeway v. International Bhd. of Elec. Workers, Local No. 134*, 466 F. Supp. 595, 597 (N.D. Ill. 1979); *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135, 139 (N.D. Ill. 1977); *see Maldonado v. Broadcast Plaza, Inc.*, 10 Fair Empl. Prac. Cas. (BNA) 839, 839-40 (D. Conn. 1974).

18. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 568 (E.D. Cal. 1982); *see, e.g.*, *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978); *Samuel v. Virgin Islands Tel. Corp.*, 11 Empl. Prac. Dec. (CCH) ¶ 10,643, at 6700 (D.V.I. 1975).

19. *See, e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 163 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 455 (1975); *Tillman v. Wheaton-Haven Recreation*

McDonald v. Santa Fe Trail Transportation Co.,²⁰ the Court held that the statute also protects whites from racial discrimination.²¹ The Court emphasized that "the statute explicitly applies to 'all persons.'"²² Furthermore, the Court rejected a "mechanical reading" of the phrase "as is enjoyed by white citizens" that would limit the class of section 1981 plaintiffs to non-whites.²³ It emphasized that the legislative history of the phrase²⁴ demonstrates that the phrase was "viewed simply as a technical adjustment without substantive effect"²⁵ and thus was simply meant "to emphasize the racial character of the rights being protected."²⁶

Despite the Supreme Court's characterization of the rights protected as racial, the Court has also interpreted section 1981 to apply to aliens.²⁷ The decisions are unclear, however, whether aliens can state a claim of alienage-based discrimination or are limited to claims of racial discrimination.²⁸ Thus, under the Supreme Court's interpreta-

Ass'n, 410 U.S. 431, 433 (1973); *Georgia v. Rachel*, 384 U.S. 780, 783 (1966); cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968) (§ 1982 claim).

20. 427 U.S. 273 (1976). In *McDonald*, three employees, one black and two whites, were charged with misappropriating company property, but only the white employees were discharged. *Id.* at 275-76.

21. *Id.* at 296; see B. Schlei & P. Grossman, *Employment Discrimination Law* 610 (1976) ("Unanswered was the question whether § 1981 would be applied to discrimination on a basis other than race, such as national origin . . .").

22. 427 U.S. at 287 (emphasis in original).

23. *Id.* (quoting *Georgia v. Rachel*, 384 U.S. 780, 791 (1966)); see Comment, *Developments in the Law—Section 1981*, 15 Harv. C.R.-C.L. L. Rev. 29, 74 (1980) [hereinafter cited as *Developments in the Law*].

24. Cong. Globe, 39th Cong., 1st Sess. 1115, 157 app. (1866).

25. 427 U.S. at 291.

26. *Id.* at 293 (quoting *Georgia v. Rachel*, 384 U.S. 780, 791 (1966)).

27. *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948); see *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (per curiam). Originally § 1981 applied only to "citizens" of the United States. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. In 1870, § 1981 was amended, Enforcement Act of 1870, ch. 114, 16 Stat. 144, to extend "the operation of the civil rights bill . . . to all persons within the jurisdiction of the United States." Cong. Globe, 41st Cong., 2d Sess. 1536 (1870) (remarks of Sen. Stewart).

28. E.g., *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948) ("section [1981] and the Fourteenth Amendment on which it rests in part protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color"); B. Schlei & P. Grossman, *supra* note 21, at 265; see *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Developments in the Law*, *supra* note 23, at 91-92. Most lower courts have interpreted the Supreme Court's decisions as prohibiting discrimination merely based on a person's status as an alien. *Ramirez v. Sloss*, 615 F.2d 163, 165 (5th Cir. 1980); *Roberto v. Hartford Fire Ins. Co.*, 177 F.2d 811, 814 (7th Cir. 1949), *cert. denied*, 339 U.S. 920 (1950); *Speiss v. C. Itoh & Co. (Am.)* 408 F. Supp. 916, 928 n.17 (S.D. Tex. 1976), *rev'd on other grounds*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds and remanded*, 102 S. Ct. 2951 (1982); *Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529, 536 (S.D. Tex. 1972), *aff'd in part, rev'd in part*, 498 F.2d 641, 653-54 (5th Cir. 1974); see *Jones v. United Gas Improve-*

tion, blacks, whites and aliens are afforded protection under section 1981. The extent of the protection, however, is still unclear.

Although the Supreme Court has made frequent references to the racial character of the rights protected under section 1981,²⁹ it has never defined the term "race."³⁰ This may be explained in light of the nature of the litigants before the Court in those cases in which these references were made; the plaintiff was either black or white and had specifically alleged racial discrimination.³¹ The absence of a clear definition of the term "race" has resulted in inconsistent approaches by the lower federal courts for determining when a plaintiff has been subjected to "racial discrimination."³² Furthermore, courts disagree whether the Supreme Court's characterization of the racial discrimination prohibited should be interpreted as excluding other forms of discrimination,³³ such as national origin discrimination.³⁴

ment Corp., 68 F.R.D. 1, 15 (E.D. Pa. 1975). *But see* B. Schlei & P. Grossman, *supra* note 21, at 265 ("§ 1981 might only provide protection to aliens who can contend that the discrimination was racial in character."). *See infra* notes 132-34 and accompanying text.

29. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287 (1976); Georgia v. Rachel, 384 U.S. 780, 791 (1966).

30. Ortiz v. Bank of Am., 547 F. Supp. 550, 556, 565 (E.D. Cal. 1982).

31. *Id.* at 556; *see, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 275-76 (1976) (white plaintiffs); Runyon v. McCrary, 427 U.S. 160, 163-64 (1976) (black plaintiffs); Johnson v. Railway Express Agency, 421 U.S. 454, 455 (1975) (black plaintiff); Georgia v. Rachel, 384 U.S. 780, 783 (1966) (same); Comment, *Mexican Americans: Are They Protected By The Civil Rights Act Of 1866?*, 20 Santa Clara L. Rev. 889, 895-96 (1980) [hereinafter cited as *Mexican Americans*].

32. *See infra* pt. I(B).

33. The lower courts have held that sex and age discrimination are not prohibited by § 1981. *See* Kodish v. United Airlines, 463 F. Supp. 1245, 1250 (D. Colo. 1979) (age discrimination), *aff'd*, 628 F.2d 1301 (10th Cir. 1980); Thomas v. Firestone Tire & Rubber Co., 392 F. Supp. 373, 375 (N.D. Tex. 1975) (sex discrimination); Olson v. Rembrandt Printing Co., 375 F. Supp. 413, 417 (E.D. Mo. 1974) (same), *aff'd*, 511 F.2d 1228 (8th Cir. 1975). The Supreme Court has summarily stated, in dictum, that § 1981 does not proscribe discrimination based on sex or religion. Runyon v. McCrary, 427 U.S. 160, 167 (1976) ("§ 1981 is in no way addressed to such categories of selectivity" as discrimination based on religion or sex). *But see* Marlowe v. General Motors Corp., 4 Fair Empl. Prac. Cas. (BNA) 1160, 1161 (E.D. Mich. 1972) (religious discrimination against Jews is tantamount to racial discrimination and thus prohibited under § 1981), *vacated on other grounds and remanded*, 489 F.2d 1057 (6th Cir. 1973). Whether "ethnic" plaintiffs should be able to recover under § 1981 on the further ground that they were discriminated against on the basis of their sex, age or religion is beyond the scope of this Note.

34. *See* Ortiz v. Bank of Am., 547 F. Supp. 550, 559 (E.D. Cal. 1982); 3 A. Larson & L. Larson, *supra* note 5, § 71.10; 1 C. Antieau, *supra* note 3, § 23. Compare Ortiz v. Bank of Am., 547 F. Supp. 550, 568 (E.D. Cal. 1982) (plaintiff's membership in a distinct group subject to discrimination is protectible) with Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 10-15 (E.D. Pa. 1975) (Spanish-surnamed plaintiff's discrimination claim based on national origin is not protectible).

B. The Lower Courts

Most lower courts have interpreted section 1981 as proscribing only racial discrimination and accordingly have refused to allow claims based solely on national origin.³⁵ Some justify this interpretation by reference to the historical framework in which the statute was passed. These courts emphasize that because section 1981 was originally enacted pursuant to the thirteenth amendment,³⁶ it is directed solely at racial discrimination.³⁷ Other courts interpret the phrase "as is enjoyed by white citizens" to limit the proper class of litigants under section 1981 to "non-whites."³⁸ In addition, many courts rely upon Supreme Court characterizations of the "racial" rights protected by section 1981 to exclude national origin claims.³⁹

The most restrictive approach provides that a plaintiff who does not allege racial discrimination fails to state a claim under the statute.⁴⁰

35. See, e.g., *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610, 613 (M.D. Pa. 1978); *Vazquez v. Werner Continental, Inc.*, 429 F. Supp. 513, 515 (N.D. Ill. 1977); *National Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Supp. 1224, 1228 (D.D.C. 1976), *aff'd mem. sub nom.* *National Ass'n of Gov't Employees v. Brown*, 556 F.2d 76 (D.C. Cir. 1977); *Gradillas v. Hughes Aircraft Co.*, 407 F. Supp. 865, 867 (D. Ariz. 1975); see also 3 A. Larson & L. Larson, *supra* note 5, § 94.10, at 20-11.

36. 3 A. Larson & L. Larson, *supra* note 5, § 88.10; see *Runyon v. McCrary*, 427 U.S. 160, 170 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968); Cong. Globe, 39th Cong., 1st Sess. 43 (1865).

37. E.g., *Saad v. Burns Int'l Sec. Serv., Inc.*, 456 F. Supp. 33, 37 (D.D.C. 1978); *National Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Supp. 1224, 1228 (D.D.C. 1976), *aff'd mem. sub nom.* *National Ass'n of Gov't Employees v. Brown*, 556 F.2d 76 (D.C. Cir. 1977); *Kurylas v. United States Dep't of Agriculture*, 373 F. Supp. 1072, 1075-76 (D.D.C. 1974), *aff'd mem.*, 514 F.2d 894 (D.C. Cir. 1975); see 3 A. Larson & L. Larson, *supra* note 5, § 71-10, at 13-21.

38. *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 11-12 (E.D. Pa. 1975) (quoting *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966) which construed the phrase as emphasizing the racial character of the rights protected); see *Lobos v. Aeromexico*, 18 Empl. Prac. Dec. (CCH) ¶ 8886, at 5661 (S.D.N.Y. 1978); *Enriquez v. Honeywell Inc.*, 431 F. Supp. 901, 904 (W.D. Okla. 1977); *Kurylas v. United States Dep't of Agriculture*, 373 F. Supp. 1072, 1075 (D.D.C. 1974), *aff'd mem.*, 514 F.2d 894 (D.C. Cir. 1975); *Marshall v. Plumbers & Steamfitters Local Union No. 60*, 343 F. Supp. 70, 72 (E.D. La. 1972) (quoting *Perkins v. Banster*, 190 F. Supp. 98, 99 (D. Md.), *aff'd per curiam*, 285 F.2d 426 (4th Cir. 1960)); 3 A. Larson & L. Larson, *supra* note 5, § 94.10, at 20-12 to 20-13.

39. See, e.g., *Pollard v. City of Hartford*, 539 F. Supp. 1156, 1164 (D. Conn. 1982); *Plummer v. Chicago Journeyman Plumbers' Local Union No. 130*, 452 F. Supp. 1127, 1142 (N.D. Ill. 1978), *rev'd on other grounds sub nom.* *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610, 612 (M.D. Pa. 1978); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 11-12 (E.D. Pa. 1975).

40. E.g., *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 129 (E.D. Pa. 1978); *Mouriz v. Avondale Shipyards, Inc.*, 428 F. Supp. 1025, 1027 (E.D. La. 1977); *Boling v. National Zinc Co.*, 435 F. Supp. 18, 20 (N.D. Okla. 1976); *National Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Supp. 1224, 1228 (D.D.C. 1976), *aff'd mem. sub nom.* *National Ass'n of Gov't Employees v. Brown*, 556 F.2d 76 (D.C. Cir.

and therefore refuses to recognize a claim based on national origin. Furthermore, even if a national origin plaintiff does allege "racial" discrimination, his claim is likely to be dismissed because many courts construe the term "race" narrowly. For example, East Indians, Mexican-Americans, Puerto Ricans and other Hispanic and Spanish-surnamed persons have tried to assert "race" discrimination claims, yet have been unsuccessful under this approach because technically they were Caucasian, and their discrimination claim was considered to be based solely on national origin.⁴¹ In particular, one court dismissed a claim by an East Indian because he failed to provide "factual support" for his assertion that he was "Black."⁴²

These same groups, however, have been protected by other courts under more expansive interpretations of the racial test.⁴³ Some courts implicitly recognize that individuals of certain national origin groups

1977); *Gradillas v. Hughes Aircraft Co.*, 407 F. Supp. 865, 867 (D. Ariz. 1975); *Kurylas v. United States Dep't of Agriculture*, 373 F. Supp. 1072, 1076 (D.D.C. 1974), *aff'd mem.*, 514 F.2d 894 (D.C. Cir. 1975); *see LaMont v. Forman Bros.*, 410 F. Supp. 912, 918 (D.D.C. 1976); *Easley v. Blossom*, 394 F. Supp. 343, 344 (S.D. Fla. 1975); *Olson v. Rembrandt Printing Co.*, 375 F. Supp. 413, 417 (E.D. Mo. 1974), *aff'd*, 511 F.2d 1228 (8th Cir. 1975).

41. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 560 (E.D. Cal. 1982); *see, e.g., Shah v. Mount Zion Hosp. & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981) (Black East Indian of African descent); *Wald v. International Bhd. of Teamsters*, 24 Fair Empl. Prac. Cas. (BNA) 616, 619 (C.D. Cal. 1980) (Jewish); *Hiduchenko v. Minneapolis Medical & Diagnostic Center*, 467 F. Supp. 103, 106 (D. Minn. 1979) (Ukrainian); *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 128-29 (E.D. Pa. 1978) (Hispanic); *Vazquez v. Werner Continental, Inc.*, 429 F. Supp. 513, 514-15 (N.D. Ill. 1977) (Mexican); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 788-89 (W.D. Pa. 1977) (Slavic); *Sokolski v. Corning Glass Works*, 14 Fair Empl. Prac. Cas. (BNA) 936, 937 (W.D. Pa. 1977) (Slavic); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15 (E.D. Pa. 1975) (Spanish-surnamed).

42. *Shah v. Mount Zion Hosp. & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981).

43. *E.g., London v. Coopers & Lybrand*, 644 F.2d 811, 818 n.4 (9th Cir. 1981) (Chinese, characterized as racial minority); *Gonzalez v. Stanford Applied Eng'g, Inc.*, 597 F.2d 1298, 1300 (9th Cir. 1979) (per curiam) (Mexican-American, racial prejudice based upon skin color); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1159, 1160 (9th Cir. 1976) (East Indian, discrimination claim characterized as racial); *Chicano Police Officer's Ass'n v. Stover*, 526 F.2d 431, 436 (10th Cir. 1975) (Chicano, whether plaintiffs had "standing" on racial or national origin grounds not discussed), *vacated on other grounds and remanded*, 426 U.S. 944 (1976); *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1111, 1112 (9th Cir. 1975) (American Indians, same); *Naraine v. Western Elec. Co.*, 507 F.2d 590, 591, 593 (8th Cir. 1974) (per curiam) (East Indian Hindu, permitted to demonstrate racial discrimination but failed to do so); *Alvarado v. El Paso Indep. School Dist.*, 445 F.2d 1011, 1011 (5th Cir. 1971) (en banc) (Mexican-Americans, discrimination claim both racial and "ethnic"); *see Al-Khazraji v. Saint Francis College*, 523 F. Supp. 386, 392 (W.D. Pa. 1981) (Arabian, born in Iraq); *Khawaja v. Wyatt*, 494 F. Supp. 302, 304 (W.D.N.Y. 1980) (Pakistani Muslim); *Maldonado v. Broadcast Plaza, Inc.*, 10 Fair Empl. Prac. Cas. (BNA) 839, 839-40 (D. Conn. 1974) (Spanish-surnamed); *Rios v. Enterprise Ass'n Steamfitters Local Union No. 638*, 326 F. Supp. 198, 201 (S.D.N.Y. 1971) (Puerto Rican).

may suffer "racial" discrimination,⁴⁴ and use a second approach under which a claim of national origin discrimination survives a motion to dismiss.⁴⁵ However, because national origin discrimination is considered actionable only to the extent it is motivated by, or indistinguishable from, racial discrimination,⁴⁶ these courts then require the plaintiff to demonstrate that the alleged discrimination was in fact based upon race.⁴⁷ Under this approach, therefore, the plaintiff may be required to demonstrate "racial animus," described by one court as "discrimination based upon the perception by those who allegedly discriminated [that the plaintiff] is a member of an identifiable racial group different from white persons."⁴⁸ Other courts require a plaintiff who may be technically "Caucasian" to demonstrate that he has objective racial characteristics—such as brown skin color.⁴⁹ Thus, an allegation that Hispanics as a group are subject to racial discrimina-

44. See *Naraine v. Western Elec. Co.*, 507 F.2d 590, 591, 593 (8th Cir. 1974) (per curiam); *Shah v. Firemen's Fund Ins. Co.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,803, at 25,756 (N.D. Cal. 1982); *Pollard v. City of Hartford*, 539 F. Supp. 1156, 1164-65 (D. Conn. 1982); *Quintanilla v. Scientific-Atlanta, Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 1178, 1180 (N.D. Tex. 1982); *Khawaja v. Wyatt*, 494 F. Supp. 302, 304 (W.D.N.Y. 1980); *Carrillo v. Douglas Aircraft Co.*, 18 Fair Empl. Prac. Cas. (BNA) 830, 830 (C.D. Cal. 1978); *Quiroz v. City of Santa Ana*, 18 Fair Empl. Prac. Cas. (BNA) 1138, 1140 (C.D. Cal. 1978); *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254, 264 (N.D. Ill. 1978), *aff'd*, 660 F.2d 1217 (7th Cir. 1981); *Plummer v. Chicago Journeyman Plumbers' Local Union No. 130*, 452 F. Supp. 1127, 1142 n.7 (N.D. Ill. 1978), *rev'd on other grounds sub nom. Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Puerto Rican Media Action & Educ. Council v. Metromedia, Inc.*, 9 Empl. Prac. Dec. (CCH) ¶ 10,173, at 7792 (S.D.N.Y. 1975); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 13 n.10 (E.D. Pa. 1975); *Maldonado v. Broadcast Plaza, Inc.*, 10 Fair Empl. Prac. Cas. (BNA) 839, 839-40 (D. Conn. 1974); *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 755 (D. Or. 1973).

45. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 561 (E.D. Cal. 1982); *see, e.g., Carrillo v. Illinois Bell Tel. Co.*, 538 F. Supp. 793, 797 (N.D. Ill. 1982); *Saad v. Burns Int'l Sec. Serv., Inc.*, 456 F. Supp. 33, 37 (D.D.C. 1978); *Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 186, 188 (D. Md. 1977); *Puerto Rican Media Action & Educ. Council v. Metromedia, Inc.*, 9 Empl. Prac. Dec. (CCH) ¶ 10,173, at 7792 (S.D.N.Y. 1975).

46. *Carididi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (per curiam); *Madrigal v. Certainteed Corp.*, 508 F. Supp. 310, 311 (W.D. Mo. 1981); *Cubas v. Rapid Am. Corp.*, 420 F. Supp. 663, 665 (E.D. Pa. 1976).

47. See *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 561 (E.D. Cal. 1982); *Developments in the Law*, *supra* note 23, at 87-88.

48. *Apodaca v. General Elec. Co.*, 445 F. Supp. 821, 823 (D.N.M. 1978); *see Madrigal v. Certainteed Corp.*, 508 F. Supp. 310, 311 (W.D. Mo. 1981); *Lopez v. Sears, Roebuck & Co.*, 493 F. Supp. 801, 807 (D. Md. 1980); *Enriquez v. Honeywell Inc.*, 431 F. Supp. 901, 906 (W.D. Okla. 1977).

49. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 561 (E.D. Cal. 1982); *e.g., Carrillo v. Illinois Bell Tel. Co.*, 538 F. Supp. 793, 796-97 (N.D. Ill. 1982); *Trehan v. IBM Corp.*, 24 Fair Empl. Prac. Cas. (BNA) 443, 445 (S.D.N.Y. 1980); *Patel v. Holley House Motels*, 483 F. Supp. 374, 383 (S.D. Ala. 1979); *Vigil v. City and County of*

tion would not be sufficient.⁵⁰ A Hispanic plaintiff would be required to establish that as an individual he is considered "non-white" and was discriminated against on that basis.⁵¹

A third, "pragmatic approach," extends protection under section 1981 to groups that are commonly perceived, "however inaccurately or stupidly,"⁵² as racially distinct and which have traditionally been subject to group discrimination.⁵³ The principal beneficiaries of this approach have been Hispanics⁵⁴ because courts have concluded that although Hispanics as a group may be technically "Caucasian," "skin color, language, cultural differences and historical background are persuasive reasons for classifying them as distinct from 'white citizens' within the meaning of § 1981."⁵⁵

Denver, 15 Empl. Prac. Dec. (CCH) ¶ 8000, at 6938-39 (D. Colo. 1977); *Gomez v. Pima County*, 426 F. Supp. 816, 819 (D. Ariz. 1976); *Cubas v. Rapid Am. Corp.*, 420 F. Supp. 663, 666 n.2 (E.D. Pa. 1976); see *Gonzalez v. Stanford Applied Eng'g, Inc.*, 597 F.2d 1298, 1300 (9th Cir. 1979) (per curiam); *Developments in the Law*, *supra* note 23, at 87-88.

50. *Carrillo v. Illinois Bell Tel. Co.*, 538 F. Supp. 793, 796-97 (N.D. Ill. 1982); see *Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 186, 187-88 (D. Md. 1977). Courts recognize that the term "Hispanic" comprises a wide spectrum of racial and ethnic backgrounds including Old-World Spaniards, New-World Indians, blacks and mestizos of mixed ancestry, and thus courts require demonstration of distinguishing "racial" characteristics. *Carrillo v. Illinois Bell Tel. Co.*, 538 F. Supp. 793, 796 (N.D. Ill. 1982).

51. *Carrillo v. Illinois Bell Tel. Co.*, 538 F. Supp. 793, 797 (N.D. Ill. 1982).

52. *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 788 (W.D. Pa. 1977) (dictum).

53. *Id.*; see *Aponte v. National Steel Serv. Center*, 500 F. Supp. 198, 202-03 (N.D. Ill. 1980); *Ridgeway v. International Bhd. of Elec. Workers, Local No. 134*, 466 F. Supp. 595, 597 (N.D. Ill. 1979); *Cervantes v. Dobson Bros. Constr. Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 8979, at 6085 (D. Neb. 1978); *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254, 263-64 (N.D. Ill. 1978), *aff'd*, 660 F.2d 1217 (7th Cir. 1981); *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135, 138-39 (N.D. Ill. 1977). See generally 3 A. Larson & L. Larson, *supra* note 5, § 94.30 (discussing the "pragmatic" approach and its origin).

54. 3 A. Larson & L. Larson, *supra* note 5, § 94.30; see *Greenfield & Kates, Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Calif. L. Rev. 662, 730-31 (1975) (arguing that Mexican-Americans are commonly perceived as racially distinct, and should therefore come within § 1981's protection). As noted in *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 559 n.16 (E.D. Cal. 1982), the term Hispanic is only questionably descriptive. The courts, however, use the term to describe a number of national origin groups, including Mexican-Americans and Puerto Ricans, and therefore this Note uses this term to embrace the above groups.

55. *Cervantes v. Dobson Bros. Constr. Co.*, 19 Empl. Prac. Dec. (CCH) ¶ 8979, at 6085 (D. Neb. 1978); see, e.g., *Aponte v. National Steel Serv. Center*, 500 F. Supp. 198, 202-03 (N.D. Ill. 1980); *Ridgeway v. International Bhd. of Elec. Workers, Local No. 134*, 466 F. Supp. 595, 597 (N.D. Ill. 1979); *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254, 263-64 (N.D. Ill. 1978), *aff'd*, 660 F.2d 1217 (7th Cir. 1981); *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135, 139 (N.D. Ill. 1977); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 788 (W.D. Pa. 1977) (dictum). See generally 3 A. Larson & L. Larson, *supra* note 5, § 94.30 (discussing the "pragmatic" approach's application to Hispanics).

In contrast to these approaches, which construe section 1981 as requiring some kind of racial test, a few courts reject this requirement and instead recognize claims based solely on national origin discrimination.⁵⁶ These courts emphasize that section 1981 explicitly applies to "all persons" and they decline to equate the "as is enjoyed by white citizens" language of the statute with a racial classification.⁵⁷ Rather, they construe the phrase as guaranteeing all persons the same rights as the most favored class—historically, "white citizens."⁵⁸ Accordingly, a section 1981 cause of action will be stated if a

plaintiff alleges discrimination on the basis of membership in a group composed of both men and women, the boundaries of which are not fixed by age or exclusively by religious faith, and which is of a character that it is or may be perceived as distinct when measured against the group which enjoys the broadest [civil] rights.⁵⁹

This standard avoids the myriad of problems inherent in the racial test invoked by other courts.

II. THE UNREASONABLENESS OF THE RACIAL TEST

A. *The Test's Ambiguity and Impracticality*

Use of a racial test "in political or judicial functions is fraught with peril"⁶⁰ and for purposes of section 1981 leads to confusion because no single judicial or scientific definition of "race" exists.⁶¹ Indeed, the

56. *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970 (10th Cir. 1979); *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 568 (E.D. Cal. 1982); *Al-Khazraji v. Saint Francis College*, 523 F. Supp. 386, 391-92 (W.D. Pa. 1981); *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1369-70 (D.N.M. 1980); *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978); see *Samuel v. Virgin Islands Tel. Corp.*, 11 Empl. Prac. Dec. (CCH) ¶ 10,643, at 6700 (D.V.I. 1975); *Sud v. Import Motors Ltd.*, 379 F. Supp. 1064, 1072 (W.D. Mich. 1974); *Sabala v. Western Gillette, Inc.*, 362 F. Supp. 1142, 1147 (S.D. Tex. 1973), *aff'd in part, rev'd in part*, 516 F.2d 1251 (1975), *vacated on other grounds and remanded*, 431 U.S. 951 (1977); *I C. Antieau*, *supra* note 3, § 23 (quoting *Ridgeway v. International Bhd. of Elec. Workers Local Union No. 134*, 466 F. Supp. 595, 597 (N.D. Ill. 1979)).

57. See, e.g., *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970 (10th Cir. 1979); *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 564 (E.D. Cal. 1982); *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978).

58. *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978).

59. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 568 (E.D. Cal. 1982).

60. *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978); accord *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 568 (E.D. Cal. 1982).

61. See *United States v. Thind*, 261 U.S. 204, 211-12 & n.4 (1923); *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 565-66 (E.D. Cal. 1982); see also Young, *Racial Classifications in Employment Discrimination Cases: The Fifth Circuit's Refusal to Prescribe Standards*, 11 Cum. L. Rev. 347, 349-50 (1980) (discussing lack of judicial standards for delineating a racial class for purposes of class action certification). Compare *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610, 613 (M.D. Pa. 1978) (discrimination against Hispanics was not based on race) with *Carrillo v. Douglas Aircraft Co.*, 18

Supreme Court has failed to outline the scope of the racial discrimination prohibited by section 1981, while in another context it has commented on the difficulty associated with assigning groups to "grand racial divisions"⁶² based on a scientific definition of the term "race." It stated that the word "white" was "to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood."⁶³ Therefore, although the Court acknowledged that an Indian Hindu might be "racially" Caucasian,⁶⁴ he was not considered "white"⁶⁵ for purposes of a federal naturalization law.⁶⁶

In contrast to this expansive definition, many lower courts construing section 1981 appear to apply a narrower, objective standard in determining whether the plaintiff has been discriminated against on the basis of his "race."⁶⁷ Underlying this objective inquiry, however, are these courts' subjective perceptions of what constitutes racially distinct characteristics.⁶⁸ A further problem with this objective standard is that scientists themselves widely disagree over the proper classifications of races.⁶⁹ For example, depending on the authority consulted, the number of races ranges from three to thirty.⁷⁰ Attempts at

Fair Empl. Prac. Cas. (BNA) 830, 830 (C.D. Cal. 1978) ("Because Mexican-Americans constitute a separate race, plaintiff . . . is protected by § 1981.").

62. United States v. Thind, 261 U.S. 204, 212 (1923).

63. *Id.* at 214-15.

64. *Id.* at 211. See generally Young, *supra* note 61, at 365 (explaining why both fair-skinned Scandinavians and brown-skinned Hindus are properly classified as Caucasian).

65. 261 U.S. at 214-15.

66. Acts of Mar. 26, 1790, ch. 3, July 14, 1870, ch. 254, Rev. Stat. § 2169, 18 Stat. 380 (2d ed. 1878).

67. Young, *supra* note 61, at 349 & n.6; see, e.g., Shah v. Mount Zion Hosp. & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981) (plaintiff did not provide factual support for the assertion that he is "Black"); Trehan v. IBM Corp., 24 Fair Empl. Prac. Cas. (BNA) 443, 445 (S.D.N.Y. 1980) (plaintiff must demonstrate that he is not of the "white race"); Saad v. Burns Int'l Sec. Servs., Inc., 456 F. Supp. 33, 37 (D.D.C. 1978) (plaintiff may not merely allege that he is "non-Caucasian"); Vera v. Bethlehem Steel Corp., 448 F. Supp. 610, 613 (M.D. Pa. 1978) (although Hispanic peoples generally have been subject to discrimination similar to racial discrimination, this is not sufficient to constitute individual "racial" discrimination).

68. Ortiz v. Bank of Am., 547 F. Supp. 550, 560 (E.D. Cal. 1982) ("these cases . . . reflect only conclusions . . . based on faulty if unexpressed premises").

69. United States v. Thind, 261 U.S. 204, 212 (1923); see Ortiz v. Bank of Am., 547 F. Supp. 550, 565-66 (E.D. Cal. 1982); LaFore v. Emblem Tape & Label Co., 448 F. Supp. 824, 826 (D. Colo. 1978). But see Young, *supra* note 61, at 364-65 (suggesting that the term "race" is subject to scientific definition according to "anthropological norms" and proposing that courts use these norms so as to "lend certainty to the present state of the law").

70. See United States v. Thind, 261 U.S. 204, 212 (1923); Ortiz v. Bank of Am., 547 F. Supp. 550, 565-66 (E.D. Cal. 1982). See generally S. Molnar, Races, Types & Ethnic Groups 12-13 (1975) ("as few as three and as many as thirty-seven races have been described" and noting that "one's classification usually depends on the purpose

static classifications are also complicated by the fact that races evolve; "some vanish, some new ones emerge and all change."⁷¹ In addition, courts attempting to determine an individual's race based on scientific classifications are likely to find themselves beyond their expertise⁷² because their decisions will necessarily be based on complex anthropological data, including skull type, skin pigmentation, facial features and blood traits.⁷³

Although courts that do not apply an objective racial test have avoided some of the pitfalls of this approach, they have encountered other difficulties. For example, courts that find a national origin claim sufficient to survive a motion to dismiss, but subsequently require proof of "racial animus," have been constrained to note that the line between race and national origin discrimination "may be so thin as to be indiscernible."⁷⁴ One court in particular remarked that it is "ironic that these cases which place the burden on plaintiff to prove that the alleged discrimination was of a 'racial character' fail to attempt to define the term 'racial' or to distinguish . . . that term from 'national origin.'"⁷⁵ Indeed, no court adopting this approach appears

of classification"); McBroom, *Science on Race*, in *Human Variation: Readings on Anthropology* 233 (1971) (because races overlap, "creating a continuum," any attempt at defining discrete categories of people is completely arbitrary).

71. *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978); see *United States v. Thind*, 261 U.S. 204, 212 (1923) (racial types may have become "so changed by intermixture of blood as to justify an intermediate classification"); *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 567 (E.D. Cal. 1982) ("the notion of race is dynamic"); S. Molnar, *supra* note 70, at 4 ("Evolution is still proceeding The composition of racial groups, as we define them now, will undoubtedly change considerably."); Young, *supra* note 61, at 365 ("[R]ace is not static.").

72. See *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 562 n.19 (E.D. Cal. 1982); *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978). For example, as noted in *Ortiz*, courts that have dismissed claims by Hispanics because it was assumed that they were not racially distinct in a scientific sense are "factually wrong." 547 F. Supp. at 561 n.18. One scientific racial classification, in fact, includes "Ladino," commonly known as Hispanics, as a distinct race. C.S. Coon, S. Garn & J. Birdsell, *A Study of the Problems of Race Formation in Man* 138 (1950).

73. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 562 n.19 (E.D. Cal. 1982); *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978). See generally S. Molnar, *supra* note 70, at 46-77 (discussing some of the physical characteristics that are used in classifying races: body size, head size and shape, brain size, face and nose form, skin color, and blood traits); Young, *supra* note 61, at 365 & n.91 (listing eight characteristics: skin pigmentation, stature, head form, facial structure, hair color and texture, eye color and presence of eye fold, form of nose and body build) (relying on L. Holmes, *Anthropology: An Introduction* 10 (1969)).

74. *Enriquez v. Honeywell Inc.*, 431 F. Supp. 901, 904 (W.D. Okla. 1977); accord *Carrillo v. Illinois Bell Tel. Co.*, 538 F. Supp. 793, 797 n.3 (N.D. Ill. 1982); *Khawaja v. Wyatt*, 494 F. Supp. 302, 305 n.1 (W.D.N.Y. 1980); *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254, 264 (N.D. Ill. 1978), *aff'd*, 660 F.2d 1217 (7th Cir. 1981); *Cubas v. Rapid Am. Corp.*, 420 F. Supp. 663, 666 n.2 (E.D. Pa. 1976); *Godbolt v. Hughes Tool Co.*, 63 F.R.D. 370, 374 (S.D. Tex. 1972); see *Gomez v. Pima County*, 426 F. Supp. 816, 819 (D. Ariz. 1976).

75. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 562 (E.D. Cal. 1982).

to have postulated an "authoritative and judicially manageable method for distinguishing between national origin discrimination and racial discrimination;"⁷⁶ in many cases the distinction may be so blurred as to be meaningless.⁷⁷

Other courts, by allowing a plaintiff alleging national origin discrimination to demonstrate his individual racial characteristics seem to be assuming that certain national origin groups can be categorized and identifiably distinguished solely on the basis of physical characteristics.⁷⁸ "This is precisely the kind of stereotyping which the civil rights statutes were designed to prevent."⁷⁹

Courts that adopt the "pragmatic approach" merely require that an individual be a member of a group that is commonly perceived as non-white and which has traditionally been the victim of discrimination.⁸⁰ Implicit in the pragmatic approach, however, is the assumption that a common perception exists as to which groups are "non-white" or racially distinct from whites. This supposition is questionable because "race" is subject to great misuse and misunderstanding, and therefore, it is doubtful that a common perception of the term exists.⁸¹ As commonly understood, race may be erroneously thought to encompass "any more or less clearly defined group thought of as a unit [usually] because of a common or presumed common past."⁸² For example, the people included within what is commonly referred to as the "Aryan race" merely share a common language root,

76. *Cubas v. Rapid Am. Corp.*, 420 F. Supp. 663, 666 n.2 (E.D. Pa. 1976). In addition, it has been pointed out that it is somewhat anomalous to rely on proof of the perceptions of the discriminators in order to determine what kind of discrimination is at work, especially because the discriminators may be "poor anthropologists." *Khawaja v. Wyatt*, 494 F. Supp. 302, 305 n.1 (W.D.N.Y. 1980) (quoting *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979)).

77. See *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 566 (E.D. Cal. 1982) (because "race" is partially defined on the basis of geographic distribution and culture—the principal concepts of national origin—"no meaningful distinction can be drawn between 'race' and 'national origin'").

78. See *supra* note 73 and accompanying text (explaining physical characteristics used to identify a "race").

79. *Khawaja v. Wyatt*, 494 F. Supp. 302, 305 n.1 (W.D.N.Y. 1980).

80. See *supra* notes 52-55 and accompanying text.

81. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 566-67 (E.D. Cal. 1982) (relying on Webster's Third New International Dictionary 1870 (1976)); see *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979) (same); S. Molnar, *supra* note 70, at 12 ("Through overuse and vague application the term *race* has become . . . encumbered with contradictory and imprecise meanings Many people take for granted that they know what 'race' means and assume that scientific investigation has long ago proved the existence of significant human racial differences—yet, each time the term is applied, a definition must be provided so that the reader will know what concept it represents.").

82. Webster's Third New International Dictionary 1870 (1976); see A. Montagu, *Statement on Race* 52 (3d ed. 1972).

rather than common physical characteristics, and consequently do not constitute a "racial" group at all.⁸³

Even if it could be agreed that a group is commonly perceived as "racially" distinct, this perception may change over time.⁸⁴ German and Irish immigrants to this country were once thought by some Americans to be "racially" inferior, as were Chinese, American Indians and Jews.⁸⁵ Absurd as it seems now, the alleged superiority of Northern whites was even posited as the reason for the defeat of Southern whites in the Civil War.⁸⁶ Nevertheless, despite its attendant ambiguities and impracticalities, the racial requirement has been perpetuated by courts as a result of a strict reading of the language and legislative history of section 1981.⁸⁷

B. *The Language and Legislative History of Section 1981*

When section 1981 was enacted after the Civil War, Congress primarily intended to eliminate the disparate treatment of blacks in the South⁸⁸ by undercutting the vitality of the "Black Codes."⁸⁹ Consistent with both this purpose and its constitutional basis in the thirteenth amendment,⁹⁰ the original version of section 1981⁹¹ extended protection to citizens of "every race and color."⁹² Doubts over congressional authority under the thirteenth amendment's enforcement clause to afford substantive rights⁹³ prompted the introduction and

83. *United States v. Thind*, 261 U.S. 204, 210 (1923).

84. *See Ortiz v. Bank of Am.*, 547 F. Supp. 550, 567 (E.D. Cal. 1982).

85. *Id.*; *see People v. Hall*, 4 Cal. 399, 404-05 (1854) (the Chinese characterized as racially inferior and "incapable of progress or intellectual development beyond a certain point"). *See generally* T. Gossett, *Race, The History of an Idea in America* 287-309 (1963) (discussing the characterization of various immigrant groups as "racially" inferior based on their origin).

86. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 567 (E.D. Cal. 1982) (quoting T. Gossett, *supra* note 85, at 311).

87. *See supra* notes 36-38 and accompanying text.

88. Cong. Globe, 39th Cong., 1st Sess. 474-76 (1866) (remarks of Sen. Trumbull).

89. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 554 (E.D. Cal. 1982); *Spieß v. C. Itoh & Co. (Am.)*, 408 F. Supp. 916, 920 (S.D. Tex. 1976), *rev'd on other grounds*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds and remanded*, 102 S. Ct. 2951 (1982). *See generally Developments in the Law, supra* note 23, at 37-43 (discussing congressional impetus for passage of § 1981).

90. U.S. Const. amend. XIII; *see, e.g., Runyon v. McCrary*, 427 U.S. 160, 170 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

91. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

92. *Id.*; *see Cong. Globe*, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull).

93. U.S. Const. amend. XIII, § 2. The authority of Congress to enact such legislation has subsequently been confirmed by the Supreme Court. *See Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-44 (1968).

passage of the fourteenth amendment,⁹⁴ pursuant to which section 1981 was then reenacted.⁹⁵

Although blacks were clearly intended as the primary beneficiaries of section 1981, nothing in the legislative history or the statutory language suggests that Congress intended to exclude from coverage all other minority groups.⁹⁶ In fact, the author of section 1981, Senator Trumbull, described it as designed "to protect all persons in the United States in their civil rights."⁹⁷

Despite the absence of any restrictive congressional intent, the lower courts disagree whether the phrase "as is enjoyed by white citizens"⁹⁸ should be interpreted to limit the scope of section 1981 to racial discrimination claims. Some courts emphasize that the word "white" indicates that protection is limited to claims based on color or race.⁹⁹ Others suggest that the phrase was included merely because white citizens enjoyed a numerical majority and superior legal protection in 1866, and thereby set the standard by which the civil rights of all persons were to be measured.¹⁰⁰ These courts suggest therefore that today it should be interpreted as prohibiting the maintenance of any favored class rather than as limiting claims to racial discrimination.¹⁰¹

94. U.S. Const. amend. XIV; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

95. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968); *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 554 (E.D. Cal. 1982); *Developments in the Law*, *supra* note 23, at 46-47; *see* 3 A. Larson & L. Larson, *supra* note 5, § 88.10, at 18-5 to 18-6.

96. *Mexican Americans*, *supra* note 31, at 895; *cf.* *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 289 n.20, 291 (1976) (no demonstration that the legislative history contradicts "the plain language" of § 1981 which was deemed to encompass discrimination against whites).

97. Cong. Globe, 39th Cong., 1st Sess. 211 (1866) (statement of Sen. Trumbull).

98. 42 U.S.C. § 1981 (1976).

99. *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 12 (E.D. Pa. 1975); *Kurylas v. United States Dep't of Agriculture*, 373 F. Supp. 1072, 1075 (D.D.C. 1974), *aff'd mem.*, 514 F.2d 894 (D.C. Cir. 1975); *Marshall v. Plumbers & Steamfitters Local Union 60*, 343 F. Supp. 70, 72 (E.D. La. 1972); 3 A. Larson & L. Larson, *supra* note 5, § 94.10, at 20-12; *cf.* *League of Academic Women v. Regents of Univ. of Cal.*, 343 F. Supp. 636, 638-39 (N.D. Cal. 1972) (sex discrimination).

100. *Spieß v. C. Itoh & Co. (Am.)*, 408 F. Supp. 916, 924 (S.D. Tex. 1976), *rev'd on other grounds*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds and remanded*, 102 S. Ct. 2951 (1982); *see, e.g., Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970 (10th Cir. 1979); *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 563-64 (E.D. Cal. 1982) (quoting *Manzanares*); *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978); *see also* Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. Rev. 1, 16 (1974) (rights possessed by white citizens became the yardstick by which all citizens' rights were to be measured).

101. *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978); *see Ortiz v. Bank of Am.*, 547 F. Supp. 550, 568 (E.D. Cal. 1982); *Miranda v. Clothing Workers, Local 208*, 10 Fair Empl. Prac. Cas. (BNA) 557, 558 (D.N.J. 1974).

The legislative history of the phrase can be read consistently with both of these interpretations because members of the House and Senate apparently attributed varying degrees of significance to the phrase.¹⁰²

The phrase was introduced as an amendment in the House by Representative Wilson to "technically 'perfect' the bill."¹⁰³ Wilson suggested that unless the qualifying phrase was incorporated, the rights might be extended to "all citizens, whether male or female, majors or minors."¹⁰⁴ Accordingly, it has been suggested that Congress did not intend to include women or minors among "all persons."¹⁰⁵ This evidence of restrictive intent in the legislative history has also been narrowly read as emphasizing "the racial character of the rights being protected."¹⁰⁶ But as one court has noted, even if the legislative history is correctly interpreted as excluding age and sex discrimination claims, this conclusion does not necessarily imply that other forms of discrimination, such as national origin discrimination, are also excluded.¹⁰⁷ In fact, upon section 1981's introduction in the House, Representative Wilson explained that the statute was intended to protect "every citizen" in the enjoyment of his civil rights and would ensure that "one *class* shall not be required to support alone the burdens which should rest on all *classes* alike."¹⁰⁸

By contrast, some members of the Senate and the Senate Judiciary Committee viewed the phrase as "superfluous."¹⁰⁹ One Senator remarked: "[T]he idea is that the rights of all persons shall be equal; and . . . the [statute] leaving out [the phrase], would attain the object."¹¹⁰ In light of some Senators' interpretation of the phrase as superfluous,

102. See *Spiess v. C. Itoh & Co. (Am.)*, 408 F. Supp. 916, 922-23 (S.D. Tex. 1976), *rev'd on other grounds*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds and remanded*, 102 S. Ct. 2951 (1982); *Mexican Americans*, *supra* note 31, at 894.

103. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 291 (1976); see Cong. Globe, 39th Cong., 1st Sess. 1115, 1117-18 (1866) (statement of Rep. Wilson).

104. Cong. Globe, 39th Cong., 1st Sess. 157 app. (1866) (statement of Rep. Wilson); see also *id.* at 1293 (remarks of Rep. Shellabarger) ("Your State may deprive women of the right to sue or contract or testify, and children from doing the same.").

105. *Developments in the Law*, *supra* note 23, at 99. In fact, the Supreme Court has summarily stated, in dictum, that "§ 1981 is in no way addressed to such categories of selectivity" as discrimination based on religion or sex. *Runyon v. McCrary*, 427 U.S. 160, 167 (1976). See *supra* note 33.

106. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 293 (1976) (quoting *Georgia v. Rachel*, 384 U.S. 780, 791 (1966)).

107. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 555 (E.D. Cal. 1982).

108. Cong. Globe, 39th Cong., 1st Sess. 1117-18 (1866) (statement of Rep. Wilson) (emphasis added).

109. *Id.* at 1413 (exchange between Senators Van Winkle and Trumbull); *id.* (Sen. Trumbull citing Senate Judiciary Committee's view that the phrase was superfluous); see *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 294-95 (1976).

110. Cong. Globe, 39th Cong., 1st Sess. 1413 (1866) (statement of Sen. Van Winkle).

it seems anomalous to construe it as affirmatively limiting the statute to racial discrimination claims; courts should regard the phrase as an expression of the standard by which all citizens' rights are to be measured.¹¹¹

Apart from this phrase, section 1981 by its terms broadly protects "all persons."¹¹² It is therefore unlikely, based on the breadth of this language, that Congress intended the protection to apply exclusively to persons discriminated against on the basis of race.¹¹³ Even though the primary congressional purpose in 1866 was to protect blacks, the language that has endured suggests a broader scope.

C. Congressional Impetus

Courts and commentators alike have questioned the propriety of using "the immediate concerns of Congress over one hundred years ago" to limit the scope of section 1981 today.¹¹⁴ These authorities argue that section 1981 should be interpreted to effectuate those broad principles of equality in civil rights that motivated Congress in 1866 to come to the aid of blacks who, at that time, were the nation's most oppressed group.¹¹⁵ Thus, the statute should be construed to apply to

111. *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978).

112. 42 U.S.C. § 1981 (1976). The language of § 1981 does not refer to race, alienage or national origin but broadly applies to "all persons." Generally, civil rights legislation is to be broadly construed to effectuate its remedial purpose. 3 C. Sands, A. Sutherland Statutes and Statutory Construction § 72.05, at 392 (4th ed. 1974). Accordingly, courts have stated that § 1981 is to be broadly construed. *See, e.g., Spiess v. C. Itoh & Co. (Am.)*, 408 F. Supp. 916, 928 n.17 (S.D. Tex. 1976), *rev'd on other grounds*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds and remanded*, 102 S. Ct. 2951 (1982); *Miranda v. Clothing Workers, Local 208*, 10 Fair Empl. Prac. Cas. (BNA) 557, 558 (D.N.J. 1974); 1 C. Antieau, *supra* note 3, § 20, at 35. *But see* *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 129 (E.D. Pa. 1978) ("statutes in derogation of the Common Law, such as the Civil Rights statutes, must be narrowly construed"). *See generally* 3 C. Sands, *supra*, § 72.05, at 391 (explaining that among earlier decisions construing civil rights statutes, narrow interpretations were not unusual and the same view is still found in some modern cases).

113. *See* *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 553 (E.D. Cal. 1982).

114. *Id.* at 555 n.7.; *accord* *Miranda v. Clothing Workers, Local 208*, 10 Fair Empl. Prac. Cas. (BNA) 557, 558 (D.N.J. 1974); *Developments in the Law, supra* note 23, at 48-49, 68-69; *see* Levinson, *New Perspectives on the Reconstruction Court* (Book Review), 26 Stan. L. Rev. 461, 483 (1974). In *Runyon v. McCrary*, 427 U.S. 160 (1976), Justice Stevens, concurring, who based his opinion that § 1981 prohibited private as well as state discrimination on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which held that § 1982 prohibited private discrimination, stated: "For even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today." 427 U.S. at 191 (Stevens, J., concurring).

115. *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 555 n.7 (E.D. Cal. 1982); *see* *Harris v. Norfolk & W. Ry.*, 616 F.2d 377, 378 (8th Cir. 1980); *Miranda v. Clothing*

the varied forms that group discrimination may take in society today,¹¹⁶ even if they were not envisioned by the 1866 Congress.

The Supreme Court has adopted analogous reasoning in applying section 1981 to whites who have suffered "racial" discrimination.¹¹⁷ In analyzing congressional intent, the Court stated that "the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."¹¹⁸ The Court further stated that it would be unwarranted to limit this broad principle merely because discrimination against whites was unforeseeable 100 years ago.¹¹⁹ Thus, it appears inconsistent to interpret the legislative history expansively for purposes of protecting whites from discrimination, and yet use a restrictive interpretation to exclude protection of claims based on national origin.

*D. Restrictive Interpretations of Section 1981's
Companion Statute: Section 1982*

In limiting section 1981's protection to racial discrimination, some courts emphasize that section 1982,¹²⁰ a companion statute to section 1981,¹²¹ has been interpreted by the Supreme Court as restricted to racial discrimination and "does not address itself to discrimination on grounds of . . . national origin."¹²² Because the Court has stated that the two statutes are to be construed together,¹²³ some courts hold that section 1981 likewise does not address national origin discrimination.¹²⁴

Workers, Local 208, 10 Fair Empl. Prac. Cas. (BNA) 557, 558 (D.N.J. 1974); *Developments in the Law*, *supra* note 23, at 68-69.

116. See Allegretti, *National Origin Discrimination and the Ethnic Employee*, 6 Employee Rel. L.J. 544, 554-55 (1981) (discussing several studies, concluding that various ethnic groups, such as Jews, Italians, Greeks and Slavs, continue to be excluded from executive and middle-management positions because of discrimination based on their national origin).

117. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976).

118. *Id.* at 296.

119. See *id.* at 295-96.

120. 42 U.S.C. § 1982 (1976 & Supp. IV 1980).

121. See *supra* note 1.

122. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). Interestingly, an executive order was recently issued under § 1982 directing all departments and agencies of the executive branch to prevent discrimination in housing based on national origin as well as race, religion or sex. See 42 U.S.C. § 1982 (1976 & Supp. IV 1980).

123. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973) ("In light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently when applied, on these facts . . ."); *accord Runyon v. McCrary*, 427 U.S. 160, 171 (1976).

124. See *Wald v. International Bhd. of Teamsters*, 24 Fair Empl. Prac. Cas. (BNA) 616, 618 (C.D. Cal. 1980); *Patel v. Holley House Motels*, 483 F. Supp. 374,

Because of several distinctions between section 1981 and section 1982, however, the two statutes have not been similarly construed for all purposes. For example, by its terms section 1982 protects only property rights while section 1981 protects a broad range of civil rights.¹²⁵ In addition, section 1982 expressly applies solely to "citizens" and therefore does not proscribe discrimination against aliens.¹²⁶ By contrast, section 1981 applies to "all persons" and has therefore been more broadly construed to protect aliens from discrimination.¹²⁷ These distinctions between sections 1981 and 1982 suggest that there may be a basis for more readily allowing national origin discrimination claims under section 1981.

E. Section 1981 as Applied to Whites and Aliens

Some courts have held that groups asserting claims based upon any form of discrimination to which whites may be subject, such as religious, sex or national origin discrimination, are not protected by the statute.¹²⁸ These courts interpret section 1981 as protecting a person's civil rights only "to the extent that such rights are enjoyed by white citizens."¹²⁹ Accordingly, because whites may be subject to national origin discrimination, the statute is thought not to reach such discrimination.¹³⁰ Yet as recognized in *McDonald v. Santa Fe Trail Transpor-*

382 (S.D. Ala. 1979); *Plummer v. Chicago Journeyman Plumbers' Local Union No. 130*, 452 F. Supp. 1127, 1142 n.6 (N.D. Ill. 1978), *rev'd on other grounds sub nom. Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Lamont v. Forman Bros.*, 410 F. Supp. 912, 918 & n.28 (D.D.C. 1976); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 12-15 (E.D. Pa. 1975); *Marshall v. Plumbers & Steamfitters Local Union 60*, 343 F. Supp. 70, 72 (E.D. La. 1972).

125. *Compare* 42 U.S.C. § 1982 (1976 & Supp. IV 1980) (right to purchase and lease real and personal property) *with* 42 U.S.C. § 1981 (1976) (right to the full and equal benefit of all laws). *See generally Discriminatory Purpose or Disproportionate Impact*, *supra* note 3, at 141 (§ 1981 is significantly broader than § 1982 "because contractual rights are implicated in many areas outside the context of property transactions").

126. 1 C. Antieau, *supra* note 3, § 39, at 70; 3 A. Larson & L. Larson, *supra* note 5, § 97.20, at 20-54.

127. 1 C. Antieau, *supra* note 3, § 21, at 35; 3 A. Larson & L. Larson, *supra* note 5, § 97.20, at 20-52 to 20-53. *See infra* note 132 and accompanying text.

128. *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 787 n.3 (W.D. Pa. 1977) (quoting *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15 (E.D. Pa. 1975)); *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 128-29 (E.D. Pa. 1978) (same); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15 (E.D. Pa. 1975); *see Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 513-14 (S.D.N.Y. 1979), *aff'd*, 638 F.2d 552 (2d Cir. 1981), *rev'd on other grounds*, 102 S. Ct. 2374 (1982).

129. *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15 (E.D. Pa. 1975).

130. *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 787 (W.D. Pa. 1977) (quoting *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15 (E.D. Pa. 1975)); *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 128 (E.D. Pa. 1978) (same);

tation Co.,¹³¹ whites may be subject to racial discrimination, and therefore carrying this argument to its logical extreme would produce an anomalous result: Racial discrimination would also not be protected by the statute.

Most lower federal courts have concluded that aliens who are discriminated against solely because of their non-citizenship status state a claim under the statute.¹³² It seems analytically inconsistent, however, to require citizens to allege racial discrimination under the statute and yet allow aliens to avoid categorizing the claim as racial.¹³³ Furthermore, this inconsistency is compounded when one realizes that citizenship discrimination is often a mask for discrimination that is actually based on national origin.¹³⁴ For example, an employer may refuse to hire both citizens and aliens of Mexican descent solely because of their Mexican origin.¹³⁵ The Mexican-American plaintiff who cannot prove racial discrimination will have his suit dismissed, but the Mexican citizen will be allowed to proceed because of his alien status. It is therefore conceivable that resident aliens, but not their American-born children, would receive the protection of section 1981. This

Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 15 (E.D. Pa. 1975); see *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 513-14 (S.D.N.Y. 1979), *aff'd*, 638 F.2d 552 (2d Cir. 1981), *rev'd on other grounds*, 102 S. Ct. 2374 (1982).

131. 427 U.S. 273 (1976). See *supra* notes 20-26 and accompanying text.

132. *E.g.*, *De Malherbe v. International Union of Elevator Constructors*, 438 F. Supp. 1121, 1137 & n.17 (N.D. Cal. 1977); *Spiess v. C. Itoh & Co. (Am.)*, 408 F. Supp. 916, 928 n.17 (S.D. Tex. 1976), *rev'd on other grounds*, 643 F.2d 353, *vacated on other grounds and remanded*, 102 S. Ct. 2951 (1982); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15 (E.D. Pa. 1975); *Troy v. Shell Oil Co.*, 378 F. Supp. 1042, 1046 (E.D. Mich. 1974), *appeal dismissed as moot*, 519 F.2d 403 (6th Cir. 1975); *Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529, 536 (S.D. Tex. 1972), *aff'd in part, rev'd in part*, 498 F.2d 641 (5th Cir. 1974); *Dougall v. Sugarman*, 339 F. Supp. 906, 910-11 (S.D.N.Y. 1971), *aff'd on other grounds*, 413 U.S. 634 (1973); see *League of Academic Women v. Regents of the Univ. of Cal.*, 343 F. Supp. 636, 640 (N.D. Cal. 1972); *Developments in the Law*, *supra* note 23, at 92. *But see* *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1007 (S.D. Tex. 1981) (aliens can be protected under § 1981 if they were "the victims of racial or other forms of discrimination actionable under [the statute]"); *Baca v. Butz*, 394 F. Supp. 888, 890 n.2 (D.N.M. 1975) (aliens who are discriminated against based on their race are protected); *B. Schlei & P. Grossman*, *supra* note 21, at 265 (aliens may have to prove racial discrimination).

133. See *Sud v. Import Motors Ltd.*, 379 F. Supp. 1064, 1072 (W.D. Mich. 1974); *Sabala v. Western Gillette, Inc.*, 362 F. Supp. 1142, 1147 (S.D. Tex. 1973), *aff'd in part, rev'd in part*, 516 F.2d 1251 (5th Cir. 1975), *vacated on other grounds and remanded*, 431 U.S. 951 (1977).

134. See 29 C.F.R. § 1606.5(a) (1982). The Title VII ban on national origin discrimination is not violated when an employer refuses to employ all aliens, making United States citizenship a requirement for employment. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). However, Title VII "prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." *Id.* at 92; see 29 C.F.R. § 1606.5(a) (1982).

135. Note, *Civil Rights—Employment—National Origin Discrimination and Aliens*, 51 Tex. L. Rev. 128, 135 (1972-1973) (discussing Title VII).

anomaly can best be resolved by construing section 1981 to apply to a plaintiff who alleges discrimination on the basis of membership in a group, not defined by sex, age or religion, which is perceived as distinct when compared with the group which enjoys the broadest civil rights.¹³⁶ This construction would include all claims of national origin discrimination, whether specifically asserted by citizens or implicitly providing the basis for an alienage-based discrimination claim.

F. Exclusivity of the Title VII Remedy

Some courts have also justified the limitation of section 1981 to racial discrimination claims by noting that victims of employment discrimination based on national origin have a thorough remedy¹³⁷ under the express language of Title VII.¹³⁸ Consequently, it is argued that there is neither need nor justification for "judicially legislating" section 1981 beyond the race discrimination at which it is supposedly directed.¹³⁹ This argument may rest in part on a reluctance to allow plaintiffs to avoid certain procedural prerequisites to suit and limitations on relief under Title VII which have no counterparts under section 1981.¹⁴⁰

136. See *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 568 (E.D. Cal. 1982).

137. *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 514 (S.D.N.Y. 1979), *aff'd*, 638 F.2d 552 (2d Cir. 1981), *rev'd on other grounds*, 102 S. Ct. 2374 (1982); *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 129 (E.D. Pa. 1978); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 789 (W.D. Pa. 1977). Under Title VII, an employer is permitted, however, to discriminate on the basis of national origin, as well as sex and religion, in those instances in which national origin is a "bona fide occupational qualification reasonably necessary to the normal operation of [his or her] particular business or enterprise." 42 U.S.C. § 2000e-2(e) (1976). The statute does not allow for a bona fide occupational qualification based on race. 2 C. Antieau, *supra* note 3, § 381, at 16.

138. 42 U.S.C. § 2000e-2 (1976).

139. *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 129 (E.D. Pa. 1978).

140. Before a plaintiff may institute a lawsuit under Title VII, 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. IV 1980), he must file a timely charge of employment discrimination with the Equal Employment Opportunity Commission and receive and act upon the Commission's statutory notice of the right to sue. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). For a general overview of the procedural prerequisites to filing a charge with the Commission, see 2 C. Antieau, *supra* note 3, §§ 482-497. Claims under § 1981 are not subject to the filing requirements of Title VII. Furthermore, unlike the remedies available under Title VII, which are limited to equitable relief, 42 U.S.C. § 2000e-5(g) (1976), the remedies under § 1981 are both legal and equitable in nature. *Carrillo v. Douglas Aircraft Co.*, 18 Fair Empl. Prac. Cas. (BNA) 830, 830 (C.D. Cal. 1978). Thus, Title VII has been construed as not authorizing either compensatory or punitive damages. 2 C. Antieau, *supra* note 3, § 520, at 222. By contrast, such damages are recoverable under § 1981, *see id.*, and because such damages are legal in nature, a plaintiff is entitled to a jury trial under § 1981, which is not available under Title VII. *Carrillo v. Douglas Aircraft Co.*, 18 Fair Empl. Prac. Cas. (BNA) 830, 830 (C.D. Cal. 1978); *see* 2 C. Antieau, *supra* note 3, § 513. A plaintiff alleging employment discrimination under

However, Title VII does not, in fact, provide a thorough remedy for all the instances in which national origin discrimination may arise. First, by its terms Title VII is inapplicable to certain employers.¹⁴¹ Furthermore, while Title VII is exclusively concerned with employment discrimination, section 1981's protection of the right "to make and enforce contracts" has application beyond the employment context. For example, other contractual relationships have been the subject of litigation under section 1981 in the following contexts: admissions to hospitals,¹⁴² labor unions¹⁴³ and private educational institutions;¹⁴⁴ consumer transactions;¹⁴⁵ and the operation of private and public parks.¹⁴⁶

It is also argued that when Title VII was passed, if Congress had wanted to redress the problem of national origin discrimination in non-employment contexts, it could have easily amended section 1981 to expressly apply to national origin discrimination.¹⁴⁷ The legislative history of Title VII, however, demonstrates that it was intended to augment, and be co-extensive with, an individual's remedy under section 1981.¹⁴⁸ Thus, it was unnecessary for Congress to amend section 1981. Accordingly, a plaintiff should not be foreclosed from relief under section 1981 merely because he may have alternate relief under Title VII.¹⁴⁹

G. National Origin Discrimination under the Fourteenth Amendment

Section 1981 rests in part upon the fourteenth amendment because it was re-enacted pursuant to that constitutional provision.¹⁵⁰ Accord-

§ 1981 need not demonstrate that he has pursued or exhausted administrative remedies before the Equal Employment Opportunity Commission before he may bring a § 1981 claim. *Goss v. Revlon, Inc.*, 548 F.2d 405, 407 (2d Cir. 1976), *cert. denied*, 434 U.S. 968 (1977); 1 C. Antieau, *supra* note 3, § 32, at 51.

141. 42 U.S.C. § 2000e(b) (1976).

142. *See United States v. Medical Soc'y*, 298 F. Supp. 145, 152 (D.S.C. 1969).

143. *See, e.g., Ridgeway v. International Bhd. of Elec. Workers, Local No. 134*, 466 F. Supp. 595, 597 (N.D. Ill. 1979); *Miranda v. Clothing Workers, Local 208*, 10 Fair Empl. Prac. Cas. (BNA) 557, 558 (D.N.J. 1974); *Marshall v. Plumbers & Steamfitters Local Union 60*, 343 F. Supp. 70, 71 (E.D. La. 1972).

144. *See Runyon v. McCrary*, 427 U.S. 160, 165 (1976).

145. *See Cody v. Union Elec.*, 518 F.2d 978, 979 (8th Cir. 1975) (*per curiam*) (*security deposits*), *rev'd on other grounds*, 545 F.2d 610 (8th Cir. 1976).

146. *See Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 432-34 (1973).

147. *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 129 (E.D. Pa. 1978).

148. H.R. Rep. No. 238, 92d Cong., 1st Sess. 19 (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2154; S. Rep. No. 415, 92d Cong., 2d Sess. 24 (1971); *see Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975).

149. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975).

150. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948).

ingly, included within section 1981's protective reach is discrimination as a result of state action.¹⁵¹ The Supreme Court has historically recognized that section 1981 and the fourteenth amendment are "closely related both in inception and in the objectives which Congress sought to achieve"¹⁵² and further that section 1981 "puts in the form of a statute what had been substantially ordained by the [fourteenth] amendment."¹⁵³

Under the equal protection clause of the fourteenth amendment, arbitrary state classifications based on either race or national origin are considered "suspect," and are therefore subject to the highest degree of judicial scrutiny.¹⁵⁴ Thus, because distinctions based on race and national origin are considered equally egregious for purposes of the equal protection clause,¹⁵⁵ it seems inconsistent to construe the fourteenth amendment to proscribe national origin discrimination in all but compelling circumstances,¹⁵⁶ and at the same time read this prohibition out of a statute that was adopted pursuant to its authority and which was to give effect to its provisions.¹⁵⁷

CONCLUSION

The use of section 1981 as an effective means of redressing the denial of civil rights has been hindered by the incorporation of the

151. The Civil Rights Cases, 109 U.S. 3, 17 (1883); 3 A. Larson & L. Larson, *supra* note 5, § 88.10, at 18-5 to 18-6; see *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948); 1 C. Antieau, *supra* note 3, § 19, at 34; cf. *Hurd v. Hodge*, 334 U.S. 24, 30-31 (1948) (§ 1982 is directed at governmental action).

152. *Hurd v. Hodge*, 334 U.S. 24, 32 (1948) (discussing the Civil Rights Act of 1866 as a whole); see *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (the fourteenth amendment applies universally, without regard to race, color or nationality and § 1981 was accordingly enacted); *Kentucky v. Powers*, 139 F. 452, 495 (C.C.E.D. Ky. 1905) ("Section [1981] is as broad as the fourteenth amendment as to the persons affected by it."), *rev'd on other grounds*, 201 U.S. 1 (1906); see also *Fraser v. McConway & Torley Co.*, 82 F. 257, 259 (C.C.D. Pa. 1897) (construing the fourteenth amendment to bar alienage-based discrimination by reference to § 1981, which was enacted to enforce the amendment, thus embracing not merely citizens but "all persons"); *In re Parrott*, 1 F. 481, 508-09 (C.C.D. Cal. 1880) (construing the fourteenth amendment to apply to every person whether "Christian or heathen, civilized or barbarous, Caucasian or Mongolian" in light of § 1981, which was enacted in "consonance" with the amendment).

153. *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880).

154. J. Nowak, R. Rotunda & J. Young, *supra* note 7, at 519, 524-25; see, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (racial classifications); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954) (ancestry or national origin classifications); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (racial classifications).

155. J. Nowak, R. Rotunda & J. Young, *supra* note 7, at 535, 549.

156. *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); see *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

157. See C. Sands, *supra* note 112, § 72.05, at 393 (noting that § 1981 and the fourteenth amendment have been interpreted in light of one another).

"racial" test. Reference to section 1981's legislative history neither compels the conclusion that a restriction on cognizable claims was intended nor demonstrates that all groups other than racial groups were to be excluded from protection. Because the term "race" is susceptible to varying interpretations, the "racial" test, whether narrowly or liberally construed, is unworkable and produces anomalous results.

A statute that is broad in language should be broadly construed. Section 1981's scope should not be determined on the basis of conditions existing at the time of its passage in 1866, but rather, in light of the varied forms that group discrimination takes today. To interpret the statute otherwise leads to an unjust result: Whites and aliens may maintain suits, but the national origin plaintiff is denied relief. Section 1981 should be interpreted in light of its nexus to the fourteenth amendment as treating discrimination on the basis of race or national origin as equally egregious.

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